A Scholastic Critique of Case Law

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I am grateful for this memorable opportunity and privilege of joining with Dr. Cohen and Dr. Hartman in a consideration of selected legal materials which will demonstrate the profound significance of ethical values as they have affected the judicial process in the Anglo-American jural order in general, and in the Supreme Court of Ohio in particular. I shall approach these materials as a member of the scholastic school of natural law and ultimately appraise in terms of agreement and disagreement with that school the choice of conflicting values which constituted the starting points for the majority and minority opinions in the cases under examination.

In a particular decision, a judge may adopt a set of ethical values, determined by *a priori* convictions, concerning the nature of man, law, and society, national or international. If his decisions consistently postulate these values, he may be classified at least approximately as professing a specific juristic faith. But a variation of subjective response to these values may shift a particular jurist from one position to another in a specific fact situation. While the normative elements inherent in every judicial process may be precisely and definitely segregated into distinct patterns for purposes of comparison and contrast, no exact classification of jurists into schools of jurisprudence is possible. I shall analyze the cases, therefore, not in terms of judicial personnel and their psychology, but insofar as the legal materials exhibit a clash of concepts, ideals, and methods which are typical of diverse bodies of juristic thought.

Basic problems in both national and international law and society have been presented by the cases under discussion. In the national sphere, two dominant issues emerge in four cases demonstrating the changing emphasis of constitutional restraints with respect to property rights and civil liberties. In the first two cases, a right of personality of an individual, namely, the right of freedom from governmental coercion with respect to religious belief, was weighed against a right of the moral person of the State, namely, the right of survival. In the third and fourth cases, a right of personality of an individual, i.e. the right of health and safety, was balanced against a right of substance of another individual. In the fifth and sixth cases, the right of substance of an individual was weighed against a conflicting right of substance of another individual. Finally, in the seventh case, the rights of

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substance of two nations were balanced against the background of international law.

In 1943, the Supreme Court of the United States decided the case of *West Virginia State Board of Education v. Barnette*,[1] holding unconstitutional a state statute which required children to salute and pledge allegiance to the American flag in order to be eligible to continue in attendance at free, public schools, and thus avoid the penalty imposed for non-attendance at school. It thus expressly overruled the case of *Minersville School District v. Gobitis*,[2] which it had adjudicated in 1940. In the words of the Justice who wrote the majority opinion in the *Gobitis* case and the minority opinion in the *Barnette* case: "That which three years ago had seemed to five successive courts to be within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justices".

This amazing and historic shift of opinion may be interpreted as a victory for a type of jurisprudence which places a maximum value upon the integration of law and morals, upon the traditional American concept of judicial supremacy, as distinguished from legislative supremacy, and upon a body of principles of right and wrong to which even the popular will is subordinate. The decision in the *Barnette* case was a defeat for what has been called Analytical Jurisprudence, which maximizes the value of legislation, minimizes that of discovered law, and restrains the judge from appealing to constitutional, and hence ethical, standards of right and wrong, or good and evil, to invalidate an act of the Legislature, regarded as morally, as well as legally, infallible and omnipotent. More value was accorded to a personality right of the individual in the *Barnette* case than in the *Gobitis* case.

In 1937, the Supreme Court of the United States, by a five to four decision, decided the case of *West Coast Hotel Co. v. Parrish*,[3] holding constitutional a state statute, providing for the establishment of minimum wages for women. It thus expressly overruled the case of *Adkins v. Children's Hospital*,[4] which it had decided in 1923. What controlling ethical factors resulted in this basic change in American constitutional law? Here as in the preceding case, the shift was in the direction of placing a higher value upon a right, or moral interest, of personality, for while the immediate interest protected in the *Parrish* case was an interest of substance, namely a minimum wage, nevertheless the most vital interest was the social interest in the right of women to live in

[1] 319 U.S. 624 (1943).
[2] 310 U.S. 586 (1940).
[3] 300 U.S. 379 (1937).
[4] 261 U.S. 525 (1923).

safety with reference to their health and morals. But this time it was the state which was according greater preciousness to a right of personality by restricting the employer's right of property.

Analytical Jurisprudence would support the constitutionality of the statute in the *Parrish* case, not because of its concern for the sacredness of human personality, but because of its emphasis upon the necessity of making the judicial process subordinate to the legislative. For the same reason, it would have held constitutional, for example, a statute repealing the living wage law in question. For Analytical Jurisprudence, the presumption of the constitutionality of legislation exists whether the statute in question devalues rights of personality or substance, or over-values them. for the Sovereign, when a law maker, with a direct mandate from the people, can do but little wrong. It may be noted that some constitutional experts accept the power-concept of law implicit in Analytical Jurisprudence when a statute curtails a property right, but rejects this concept when the legislation in question delimits a right of personality.

Actually the majority opinion in the *Parrish* case did not rely on Analytical Jurisprudence, but appealed to normative criteria to uphold the statute as constitutional. This opinion postulated a sociological conception of the due process clause of the Fourteenth Amendment of the Federal Constitution, and found that according to this conception it was constitutional for a state in the exercise of its police power to restrict freedom of contract if this was necessary to promote the social interest in the health, safety, morals and welfare of the people. This opinion de-emphasized the individual's rights of substance and substituted a sociological morality of property for the idea that each individual has a constitutionally protected right to determine his economic status even to his own and society's, detriment.

The minority of the court in the *Parrish* case, and the majority in the *Adkins* case, likewise had recourse to ethical values, but for the purpose of setting up a constitutional curb on the legislature. The right of an individual to his property was detached from social implications. The test of liberty of contract was not to be related to the question whether there was economic freedom. Under the system of morals premised by the minority of the Court in the *Parrish* case, the common good itself was better served by the legal order's protection of interests of property, rather than the safeguarding of interests of personality.

In our fifth case, *Oleff v. Hodapp*,[5] as well as in the sixth, *Everet v. Williams* (1725)[6] a right of substance of one person was

[5] 129 Ohio St. 432, 195 N.E. 838 (1935).

[6] 9 L.Q. Rev. 197 (1893).

weighed against a conflicting right of substance of another individual. They illustrate the relevance of moral considerations in the judicial process. They exemplify how jurists reply differently to such questions as: should law be an instrument for the expression of the will of supreme civil authority, as such, or should it be the tool of a system of morals, and if the latter, what particular system?

The *Oleff* case was decided by the Supreme Court of Ohio in 1935. The facts were that A and B duly made a written contract, in conformity with a state statute, whereby they entered into a joint and survivorship building and loan association account. A murdered B. The question was whether A, as the survivor, was entitled to the money which had been deposited under this contract. By a divided court, it was held that A *was* entitled to the money. The reason was that A had a vested property right, which was not divested by the criminal act of A, in the absence of a statute. The vested right resulting from the contract was said to be absolute and complete. Property rights were referred to as sacred.

The majority opinion in the *Oleff* case illustrates the extremes to which Analytical Jurisprudence may be carried. This type of Jurisprudence is characterized by an amoral approach to the judical process and by a very great reliance upon legalistic concepts for their own sake, apart from the reason or morals which originally lead to their creation and acceptance by the legal order. It denies to a judge the right to make law.

The minority opinion in the *Oleff* case held that "public policy was against assuring to a criminal the fruits of his crime". It is interesting to note that the dissenting opinion which imported right ethical values into the adjudication, did so by means of narrow, logical distinctions between formalized analytical concepts. The dissenting opinion reasoned that the property did not legally belong to A, the murderer, because A had no vested right, but only a chose in action in consequence of his contract with B, which did not create a *vested* joint tenancy, but only a non-vested right of joint survivorship, since personalty, and not realty, was involved. The court would not be disturbing vested property rights, therefore, if it withheld its aid to A, attempting to enforce his alleged right which rested on a chose in action. It was stated that a moral duty rested on the court to withhold its aid in the present situation.

Reference was made in the dissenting opinion to cases which have utilized the equitable formula of constructive trust to prevent a murderer from acquiring property rights by the commission of his crime. According to this theory, the legal order imposes a trust upon the criminal who is made to hold the property for the benefit of the person who would otherwise be entitled to it. In the

words of Justice Cardozo, the constructive trust thus becomes the "formula through which the conscience of equity finds expression". But the pull of common law reasoning was so strong that the author of the dissenting opinion preferred to reach the end dictated by moral doctrine, not by means of this equitable formula, but by legal logic.

The majority opinion in the *Oleff* case allegedly eschewed ethical values. Actually, the result of Analytical Jurisprudence in England and in the United States has been the employment of the legal order for the purpose of maintaining the values of an economic and social regime which places great emphasis on vested property rights. For a variety of reasons, the common lawyer, generally speaking, is and has always been the protagonist of such rights. In the early years of the common law, the social good was perhaps best promoted by certainty and predictability in the matter of private property, and by legal insulation against excessive feudal burdens. But whereas these burdens grew less and less and the social implications of property became more manifest in the light of new applications of old ethical norms, nevertheless, property rights remained sacred for many common lawyers, who sought to maintain the legal *status quo* by adherence to the rule of *stare decisis*, and the economic status quo by refusing to re-examine the application of the moral principle originally justifying great protection of vested rights of property, so as to see if this principle was justly operative in contemporary society.

In the English case of *Everet v. Williams* it appears that a bill was filed in the equity side of the Exchequer by one highwayman against his partner in crime for an account of the loot. The bill was dismissed. It is patent that universally accepted moral considerations prevented a judical recognition of fictitious rights claimed by the petitioner and asserted under the guise of an equitable cause of action.

Thus far ethical values of the law in action have been discussed in the sphere of national or domestic society. In the seventh case, *Northwestern Bands of Shoshone Indians v. United States*,[7] the rights of substance of two nations were weighed under international law. The Shoshone Indians nation claimed $15,000,000 as damages for the appropriation of about fifteen million acres of land, held under a title said to have been recognized by the United States in a treaty, made between the two nations in 1863. The treaty provided for "friendly and amicable relations" between the two nations. The content of another treaty was incorporated by cross reference to the effect that routes of travel through the Shoshone country should remain forever free and safe for the

[7] 324 U.S. 335 (1945).

United States and its citizens. Other uses of the Shoshone country were allowed the United States, which in turn gave a monetary consideration. Mention was made of the geographical boundaries of the Shoshone Country. The question was whether or not this treaty should be interpreted as a recognition of Indian title by implication. By a five to four decision, the Supreme Court of the United States held that the treaty in question was *not* such a recognition.

The majority opinion placed the burden of proof upon the petitioners to show that the contracting parties meant to recognize Indian title to the Shoshone Country. The treaty was strictly and narrowly construed to mean that the contract was only an exchange of a promise to pay money for a promise from the Indians to permit travel, mining, communication and transportation in the area described by the treaty. The majority opinion was characterized by the traditionally analytical approach of excluding moral values which demand resort to such environmental factors as the respective economic and physical freedoms of the contracting parties, the respective intelligence and knowledge of these parties as to the consequences of a particular legal document, and the duty of just-dealing when a victorious nation undertakes to delimit the use of the vanquished nation's land by treaty. It was admitted in the treaty that the Shoshones had "been reduced by the war to a state of utter destitution".

It now remains for me briefly to review the materials selected for today's symposium from the point of view of Scholastic Jurisprudence. Significant concepts for this type of Jurisprudence in the cases under discussion are the nature and end of man, law, society, state, constitution, the judical and legislative processes, and property. Scholastic philosophy postulates that man is a creature, endowed with the distinguishing characteristics of will and reason, with moral freedom of choice between good and evil, under a duty to conform to the dictates of his conscience, informed by reason and experience, perceiving to some extent an externally existent body of ideals, embodied in a higher law.

Man, by nature and by the higher law, ordained by the first Cause of the Universe as a measure of conduct because of the essence of man, ought to form society national and international. This society is at first under the direct discipline of the higher law, which precedes positive law, as a means of social control, and which later ought to receive recognition by the juridical institutions of civil authority, adding physical sanction to an already existing ethical coercion. Scholastic Jurisprudence does not postulate the necessity of any specific type of juridical institution, as long as it achieves higher law justice among men in society. It does not prescribe any

precise form of state structure, or administration, or constitution, or system of law for the protection of rights. In the establishment and operation of societal organizations, it does not forbid the interplay of materialistic and utilitarian considerations, as long as they remain within the inhibition of the higher or natural law, which restrains men from evil, but otherwise encourages them to feel free to experiment with their economic, social, political and juridical systems.

The chief excellence of Scholastic Jurisprudence, when compared with other varieties of juristic thinking, is the greater comprehensiveness of its approach in appraising the justice and efficiency of a particular legal order and the decisions made by its agencies in specific situations of fact. It does not mistake the part for the whole. It stresses the elements of reason and experience, the transcendental and the actual, the analytical and the essential, the permanent, idealistic and the transitory, utilitarian. Its ingredients have been selected from universal wisdom, unlimited by historical period, geographic location, or specific civilization, and united by the overall conception that man differs in kind and dignity from all the rest of creation.

But how are these generalities related to the cases which we are considering today? First of all, it may be noted that the judges which decided these cases were divided as to the relative values to be assigned to such interests as freedom of religious belief, property, state-survival, and the acquisition of the use of land by treaty. Each judge passed judgment on each of these interests by weighing it in a scale of his own choice to ascertain its value, for the purpose of deciding whether or not he could clothe the interest with a legal right so as to be protected by the legal order. Each judge accordingly used his own mechanism to measure the relative preciousness of the interests involved, in relation to some fixed standard, whether or not he was conscious of this fact. But in none of the cases was there an effort to justify the standard, or the measuring device. This means that the judical process, as it functions even in courts of last resort, requires fixed starting points of ethical values, but is not concerned, generally speaking, with the questions of their source, degree of permanence, or reason for their acceptance by the judge.

As a scholastic jurist, I favor the majority opinions in the *Parrish* and *Barnette* cases, and the dissenting opinions in the *Shoshone* and *Oleff* cases. I view each factual situation as a minor premise in a syllogism. My major premise is inductively reached by reason and experience. Reason includes not only my own conscience, but the objective conscience of others, competent in the rational and social sciences. It would be a moral reason, not the reason of the

material scientist or mathematician, since I would be dealing with moral phenomena, i.e. right and wrong human conduct. Experience would include a consideration of all relevant historical and social data thus far available. Psychologically, I would be both an introvert and an extrovert. My ultimate aim would be justice. In my effort to reach it, I would not be diverted by such formal devices or techniques, as the mechanical postulation of a presumption for or against the constitutionality of the statute in question. If the legislative process had produced a statute which conformed in a reasonable degree with the ideals of the higher law, according every human being certain inalienable rights, I should declare it constitutional. But otherwise I should declare it unconstitutional, without regard to whether it was a limitation upon property rights or civil liberties, since all rights are human rights, even property rights.

I believe that man is entitled in consequence of the higher law, independent of social contracts, or states, or constitutions, or human wills, to the use and enjoyment of property, sufficient to maintain himself and his family in a manner reasonably appropriate to his person and environmental needs. I would regard the social justice of property relationships, as well as the "mine" and "thine" conception as it affects individuals only.

I subject the rule of *stare decisis* to the test of reason, justice, and experience. As a scholastic jurist, I would not have relied as heavily upon legal precedent as was done in the *Oleff* and *Adkins* cases, for this rule may be used to preserve the value of an interest, which deserves a contemporary devaluation for the sake of justice, i.e. the doing of right, and the avoidance of wrong. I would not attach to a statute or a constitution supreme value, which would be reserved for the higher law. The will of the people, as participants in the democratic process, is a proper source of law, but the resulting imperative law obtains its ultimate vitality from the validity of the pre-existent moral qualities which the legislator has discovered by recourse to the objective natural law, so that in one sense, ultimately the basis of all positive law is discovered; otherwise there could be no inalienable rights, since these presuppose an immutable restraint upon human will, imposed by external, universal will.

As a scholastic jurist, I approve the minority opinion in the *Shoshone* case, because the majority opinion's conception of international law and the rights and duties of nations did not coincide with the notions of the founders of the science of International Law, such as Vitoria, a scholastic, mentioned with approval by Dr. Cohen. Precise land boundaries were mentioned in the Shoshone Treaty. It was obvious that the Indians were using the land in question for

the sustenance of life. They had a moral right to the land in virtue of the higher law. In a primitive society, morals are the sole medium of social control. But international society was and remains primitive, for fixed methods of ascertaining legal rights have not yet been created by positive law. Hence under international law, as understood by a scholastic jurist, the Shoshone Indians had title to their land apart from any treaty. This title existed even though there was no recognition of it by the United States in the Shoshone Treaty.

I regret that time will not permit a psychoanalysis of the judges who handed down our cases. The scholastic jurist gives adequate attention to the factor of the mental processes of judges, and of their emotions. Much benefit may be derived from an understanding of the hidden factors of inheritance and environment in the judicial process. But these are subordinate in importance to the judicial factor of the moral freedom of will of the judge in reaching a decision, determined by the choice of ethical values and their relation to the law in action.